

Appellant: Brennan et al.
Docket No.: 1442.026

Serial Number 10/055,513
Filing Date: 01/23/2002

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant:	Brennan et al.	Group Art Unit:	3751
Serial No.:	10/055,513	Confirmation No.:	9358
Filed:	January 23, 2002	Examiner:	Robert M. Fetsuga
Title:	FLUID FLOW SYSTEM		

To: Mail Stop Appeal Brief – Patents
Commissioner of Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

**APPELLANT’S REPLY BRIEF
TO THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Dear Sir:

This is a reply under 37 CFR § 1.193 from an Examiner’s Answer dated September 12, 2006. Therefore, this Reply Brief is timely filed within two months, i.e., on Monday, November 13, 2006, following Sunday, November 12, 2006.

ARGUMENT

This paper relates to the Grounds Of Rejection and Response to Argument sections of the Examiner’s Answer, dated September 12, 2006, which are incorporated herein by reference. The points raised in the Examiner’s Answer are addressed below.

SUMMARY OF CLAIMED SUBJECT MATTER

GROUND OF REJECTION

The Grounds of Rejection section of the Answer is substantially identical to the arguments in the final Office Action dated February 16, 2005, except for a minor addition relative to an anticipation argument over Martin addressed below.

RESPONSE TO ARGUMENT

Relative to the Response to Arguments section of the Answer, the Examiner's arguments are addressed below with the numbering as presented previously by Appellant and followed by Respondent.

1. The Examiner argues in the Answer that there is no disclosure in the specification as to how sidewalls 250 are attached to body 11 and alleges that the "immovable and affixed" feature recited in the claims is not evident from the illustration in Fig. 2. The Examiner also alleges that Fig. 2 clearly illustrates body 11 being separated from a tub wall/surface 20 which does not include any recess. Also, the Examiner alleges that the term "immovable" has not been indicated in the instant specification by the Appellant.

It is clear from FIG. 2 and at least paragraphs [0018] and [0029] that fluid flow system 10 may include a sidewall and a nut to securely position fluid flow system 10 on tub wall 20. As described in paragraph [0018], fluid flow system 10 includes body 11. Also, as described in paragraph [0029], fluid flow system includes sidewalls 250 surrounding inlets 80 and 90. Such sidewalls include exterior threads 255 for mating with a nut 260 to securely position fluid flow system 10 on tub wall 20. Further, as described in paragraph [0030], fluid flow system 10 could be mounted on tub wall 20 using epoxy to affix fluid flow system 10 in a position that extends through part of tub wall 20. It would be clear to one skilled in the art that the use of such a nut or epoxy would cause such a system to be affixed and immovable during the operation described in the specification, i.e., water and air being discharged through the body of the fluid flow system.

Moreover, it would be clear to one of ordinary skill in the art from a review of the specification and Fig. 2 that fluid flow system 10, including member 11, would be affixed and immovable during operation. For example, the specification discloses fluid flow system 10 being securely positioned by the nut and threads. Moreover, the specification clearly discloses the use of outlets to discharge water and air in the interior of a hydrotherapy tub. From such description, along with the remainder of the specification and FIG. 2, it would be clear to one of ordinary skill in the art that fluid flow system 10 would remain stationary during operation to allow the outlets to discharge the water and air to the tub. Further, the fluid flow system receives water and air from conduits attached thereto and the continued viability of the system would require that the system would remain stationary such that the connections between body 11 and the conduits remain attached.

The Examiner also alleges the absence of a disclosure as to how sidewalls 250 are attached to body 11 and further alleges that the sidewalls are part of the tub. As indicated, paragraph [0029] describes fluid flow system 10 including sidewalls 250. As also described above, the fluid flow system is described as including sidewalls 250 and such sidewalls having threads to engage a nut to securely position fluid flow system 10 on tub wall 20. The attachment of body 11 to sidewalls 250, both being part of fluid flow system 10, allow body 11 to be affixed and immovable relative to a tub wall. It would be understood by one skilled in the art that sidewalls 250 would be part of body 11 to allow the connection of body 11 to the tub wall. Further, the mechanism for attaching body 11 to sidewalls 250 would be evident to one of ordinary skill in the art. For example, fluid flow system 10 could be injection-molded as described in paragraph [0031]. Further, the system parts could be secured by techniques such as heating or gluing. Moreover, fluid flow system, including body 11 and sidewalls 250, could be affixed via epoxy as described in paragraph [0030].

Accordingly, Appellant respectfully disagrees with the Examiner's assertion that the disclosure is ambiguous regarding the immovability of fluid flow system 10 relative to body 11 and the attachment of the body to the sidewalls, relative to one of ordinary skill in the art.

2. The Examiner continues to argue that Gardenier teaches a plurality of outlets to receive air and water from two chambers and alleges a direct correspondence between the plain language of the claims and the Gardenier disclosure. The Examiner also argues that claim 1 does not include a limitation of a first plurality of outlets in fluid communication with a first chamber and second chamber.

Relative to an alleged direct correspondence between the plain language of the claims and Gardenier's disclosure, Appellant respectfully points out that each outlet in Gardenier is in fluid communication with a chamber, but the outlets nor the corresponding chambers are in fluid communication with each other. In contrast, claim 1 recites "a plurality of outlets in fluid communication with a first chamber *and* a second chamber" (emphasis added). Gardenier does not disclose the subject matter of this claim. Instead, each outlet is in fluid communication with a chamber in Gardenier, but there are not multiple outlets in fluid communication with both a first chamber and a second chamber, as recited in claim 1. The Examiner argues that claim 1 is broad and does not specify that each outlet communicates with both chambers and therefore does not distinguish over Gardenier. Applicant respectfully disagrees, because the claim language recites multiple outlets in fluid communication with a first chamber and a second chamber. There is no alternative language recited in the claim, and it is also not necessary to utilize "both" to achieve the intended result of the outlets being in fluid communication with both chambers, because the word "and" accomplishes the same meaning.

Relative to the Examiner's argument that a "first plurality of outlets" is not found in claim 1, Appellant agrees that the word "first" is not included in claim 1 and instead, claim 1 recites, *inter alia*, "...a plurality of outlets...". Assuming this correction, the arguments on pages 7-9 of the Appeal Brief relative to Gardenier remain valid.

Relative to claim 24, there is no disclosure in Gardenier of a plurality of outlets adapted to receive water from a first chamber and to receive air from a second chamber, nor the plurality of outlets configured to transmit the water and the air to an interior of a hydrotherapy tub. Instead, Gardenier et al. discloses an outlet in fluid communication with a first chamber and a second outlet in fluid communication with a second chamber, but not a plurality of outlets

adapted to receive water from a first chamber and air from a second chamber, nor the plurality of outlets being configured to transmit the water and the air to an interior of the hydrotherapy tub.

3. The Examiner argues that the plain language of the claims and the Martin disclosure teach the intended use of the claimed fluid flow system. Appellant has allegedly not pointed to any error in the finding of fact that the structure of claimed fluid flow system is fully met by the structure of the Martin fluid flow system.

Appellant respectfully disagrees with the Examiner's characterization and points the Board to the arguments found on pages 10-11 of the Appeal Brief which indicates that Martin '259 does not disclose the features described therein. The Examiner focuses on Martin not teaching the "intended use" of the fluid flow system and argues that the structure thereof is met by the structure of the Martin fluid flow system. The Examiner apparently has not given any weight to large portions of this claim. The Examiner has not objected to the claims as being indefinite under Section 112 or for any other reason and instead has ignored its limitations by apparently alleging that large portions of the claim are an "intended use" without specifying any objectionable language, or why such language would be improper or should not be considered.

Further, the Examiner alleges that the record does not support Appellant's characterization that the tub drain opening in Martin was equated with the opening recited in claim 1. Appellant notes that the Final Office Action dated February 16, 2005 (and page 5 of the Answer) describes on page 6 "an opening (e.g., in the bottom)" of the tub. Appellant assumed that the Examiner referred to the drain of the tub because it was the only existing opening. In the event that the drain was not referred to, Appellant respectfully submits that the Martin reference does not disclose the features recited in claim 1 relative to an opening which does not exist in Martin, and which the Examiner apparently argues could be made in the tub disclosed therein. Page 5 of the Answer newly (relative to the Final Office Action) hypothesizes "...should one decide to insert the air and water inlets 5, 6 through such an opening...". However, the device in Martin is not configured to extend through an opening in a tub and in fact there is no appropriate opening disclosed therein. Thus, the Examiner appears to argue that the device in Martin is

configured to extend through an opening which does not exist in this reference. Accordingly, the Martin device could not be configured to extend therethrough.

The Examiner also objects to the argument relative to the fluid flow system in Martin being affixed to a hydrotherapy tub. As described above, the fluid flow system of the present application is configured to be attached to a hydrotherapy tub such that the body is immovable and affixed to the surface during operation. The body in Martin is not so configured, and instead the Martin device is described as resting on a bottom surface of a tub without such immovability or affixed nature. The Examiner also newly (relative to the Final Office Action) argues on page 5 of the Answer that body 59 is disclosed in Martin as being stationary on page 3, lines 58-59, which describes a portable apparatus or appliance connected with "... a normally stationary manifold indicated broadly at 59 and having essentially the same construction as the manifold 24 ...". These lines relate to the connection of the conduit to a portion of the bath apparatus disclosed in Martin which rests on a bottom of a tub, but does not disclose a fluid flow system which is configured to be attached to a hydrotherapy tub such that the body is immovable and affixed to the surface of the tub during operation. Further, relative to claim 24, Martin does not disclose a body mounted to a tub such that the body covers an opening and is immovable and affixed to an inner surface during operation.

Relative to the Examiner's arguments regarding claim 18, lines 46-52 of page 5 of Martin '259 are quoted below:

... used as a spray if desired. It will further appear that in all embodiments of the present invention, liquid may be delivered under pressure to the injectors thereof to entrain air or other gas therewith, or the gas or other air may be delivered under pressure to the injectors to entrain liquid therewith. It will further appear that various ...

Appellant does not see the relevance of this passage relative to the orientation of the chambers recited in claim 18. The Examiner also argues that relative to claim 8 that page 1, line 34 discloses a Venturi effect. This line discloses the object of the invention is to entrain a fluid

constituent of a jet or spray in a water or gas, but does not explicitly disclose a Venturi effect, nor how it could be accomplished. Instead, it merely discloses the object of the invention.

4. The Examiner objects to Appellant's arguments on page 12 of the Brief relative to the obviousness rejection of claim 16 over Martin. In particular, the Examiner objects to Appellant's argument that there would be no suggestion or motivation to orient the air outlets of Martin such that they were located inside the water outlets. The Examiner indicates that orienting the outlets differently would not involve any more reconstruction than described in paragraphs [0019] & [0020] of the present application. Although paragraph [0019] does describe the sources of fluid for conduit 85 and 95 being reversed, there is no disclosure of any orienting of air and water outlets relative to each other. Further, when determining obviousness, there would be no reason to look at the instant specification relative to the teachings of the prior art. Applicant respectfully disagrees with the Examiner and reasserts that there would be no reason to combine the references, nor would such a combination result in the subject matter of the claims of the present application, as argued in the Appeal Brief.

5. The Examiner alleges that page 13-15 of the Appeal Brief argue perceived deficiencies of the Martin reference individually and asserts that non-obviousness cannot be established by attacking references individually. Appellant respectfully disagrees with this characterization and points the Board to pages 12-15 which addresses Martin both individually and in combination with Gardenier et al.

As noted in the Appeal Brief, Martin was alleged to disclose all the features of claim 1 except that the inlets of the '259 hydrotherapy tub do not extend through an opening. It was alleged that it would have been obvious in consideration of Gardenier et al. '303 to associate an opening with the '259 tub to facilitate installation. Martin was alleged to disclose all the features of claim 1 except for associating an opening with the '259 tub to facilitate installation. Pages 13-15 describes features alleged to be taught by Martin but which are not disclosed therein. Further, page 14 points out that the Martin '259 device would not be functional given such a single opening. Moreover, Martin teaches away from creating such an opening, as described on page 14. Also, there is no allegation relative to how or why the Martin device could be reconstructed

to allow the alleged combination. The mere presence of an opening in Gardenier does not mean that it would be obvious to combine such opening with the device in Martin to allegedly arrive at the subject matter recited in the claims of the present application. The hindsight reasoning presented by the Examiner is improper as noted in the Appeal Brief. In re Fine, 5 USPQ 2d, 1596, 1600 (Fed. Cir. 1988), W.L. Gore Assoc., Inv. v. Garlock Inc., 220 USPQ 303, 312 (Fed. Cir. 1983).

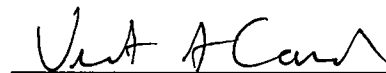
Further, relative to the Examiner's allegation on page 11 of the Answer that it would appear to be a simple matter to extend the water 5 and air 6 inlets of Martin through the opening (receiving 50) taught by Martin, Appellant assumes that the Examiner refers to outlet opening 50 described on page 3, lines 26-29, and page 6, and depicted in FIGS. 5 and 6, of Martin. Outlet opening 50 is a portion of an expansible coupling for a connection with a faucet, but is not an opening in a tub. Thus, this reference does not teach inlets configured to extend through openings in a tub to transmit water and air to first and second chambers of a fluid flow system.

6. The Examiner continues to allege that it would be obvious to combine Martin and Guiler to arrive at claims 11-15 of the present application. As indicated on page 20 of the Appeal Brief, the mere existence of a conical structure in Guiler does not provide motivation to utilize a plurality of conical structures in a first chamber of the body recited in claim 1. Further, even if the references were combined, they would not satisfy all of the elements of claim 1 or claims 11-15 as described in pages 20-21. Further, as described on pages 20 and 21 of the Appeal Brief, even if the references were combined as alleged, such a combination would not disclose, teach or suggest the features recited in claims 1 and 11-15.

CONCLUSION

In conclusion, Appellant submits that claims 1-18, 21, 23-32, 34-36, 40 and 41 satisfy 35 U.S.C. § 112, first paragraph. Claims 1, 3, 4, 10, 21, and 28 satisfy 35 U.S.C. § 112, second paragraph. Gardenier et al. does not identically disclose the features of claims 1-5, 7, 10, 18, 21, 22, 24, 25, 28, 29, 31, 32, 34-36 and 40, and these claims cannot be anticipated. Martin '259 teaches away from the subject matter recited in the independent claims, and further, a combination of Martin '259 and Gardenier would not result in the subject matter of the cited claims. Further, there is no teaching, suggestion or motivation for combining these references, and even if they were combined such a combination would not be operable for its intended purpose. Also, Guiler does not disclose the features of claims 11-15, which are alleged by the Office Action, and thus even if the references were combined as alleged, it would not result in the subject matter of these claims. Further, there is no teaching, suggestion or motivation to combine these references. Accordingly, it is respectfully submitted that these references cannot make the claims of the present application obvious. Therefore, Appellant submits that the Final Office Action should be reversed in all respects.

Respectfully submitted,



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